

# LEGAL FUNDAMENTALS OF THE SHORELINE MANAGEMENT ACT



Presented by the Department of Ecology  
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## **I. INTRODUCTION**

The Department of Ecology is currently circulating proposed revisions to the Shoreline Master Program Guidelines (“the Guidelines”).<sup>1</sup> The Guidelines are a creation of the Shoreline Management Act of 1971 (“the SMA” or “the Act”).<sup>2</sup> The SMA created a cooperative system between state and local government for regulating development on Washington’s shorelines, the cornerstone of that system being the local shoreline master program. The SMA requires the Department of Ecology to develop and periodically update rules for local governments to follow in the development and revision of master programs.<sup>3</sup> These rules are known under the SMA as the Shoreline Master Program Guidelines. The SMA’s mandate that Ecology adopt the Guidelines as rules means that the agency must translate the broad directives of the Act into concrete steps which local governments must comply with in adopting master programs. As with all rule adoption processes, this requires Ecology to interpret the language of the statute in determining how best to implement the policies and directives of the SMA.

### **A. Rule making and statutory interpretation.**

When the legislature has delegated rule-making authority to a state agency in a statute, such power is to be liberally construed.<sup>4</sup> Regulations promulgated by such an agency are presumed to be valid, and need only be reasonably consistent with the statute.<sup>5</sup> Substantial weight and deference should be given to an agency’s interpretation of statutes and regulations it administers, and an agency’s interpretation should be upheld if it reflects plausible construction of a statute’s language and is not contrary to “legislative intent.”<sup>6</sup> In the context of agency rule

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<sup>1</sup> The current version of the Guidelines is found at Chapter 173-16 of the Washington Administrative Code.

<sup>2</sup> Ch. 90.58 RCW.

<sup>3</sup> RCW 90.58.090.

<sup>4</sup> *Spry v. Miller*, 25 Wn.App. 741, 610 P.2d 931 (1980).

<sup>5</sup> *St. Francis Extended Health Care v. Dept. of Social & Health Services*, 115 Wn.2d 690, 801 P.2d 212 (1990).

<sup>6</sup> *Seatoma Convalescent Center v. Dept. of Social & Health Services*, 82 Wn.App. 495, 919 P.2d 602 (1996).

making the term “legislative intent” is not accorded the ordinary meaning of its words, but rather is a legal term of art which has a rather narrow meaning. Generally, “legislative intent” can be gleaned only from certain written records of the legislature that enacted a statute. Although over time individual legislators may express opinions regarding the meaning of the statute, such opinions do not constitute “legislative intent.”<sup>7</sup>

Final determination of the legislative intent of a statute is the province of the courts. When a court interprets a statute it looks at the plain language of the statute, however the court must also take into account previous court decisions interpreting the statute. In fact, a decision by the state supreme court interpreting a statute has the same legal effect as if the court’s language had been directly written into the statute.<sup>8</sup> In addition, the SMA created the Shorelines Hearings Board (“the SHB”) for the purpose of adjudicating cases involving the Shoreline Management Act. The Supreme Court has noted that, as a quasi-judicial body with specialized expertise in shoreline law, the SHB’s constructions of the SMA are entitled to great weight.<sup>9</sup> Thus, when looking at the relatively plain and compact language of the SMA, one must often look behind the words and consider how the courts and/or SHB have interpreted the Act. If one looks behind the words there is a lot to consider – the courts have issued dozens of opinions on the SMA since it was enacted in 1971, and the SHB has issued hundreds more. This paper briefly examines some of the provisions of the SMA in the context of previous court and SHB decisions.

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<sup>7</sup> For example, a federal court has ruled that the comments of a legislator made only a year after passage of a statute could not be considered as indicative of legislative intent, even though the legislator was a member of the conference committee that drafted the statute. *American Constitutional Party v. Munro*, 650 F.2d 184 (C.A. Wash. 1981).

<sup>8</sup> *State v. Crediford*, 130 Wn.2d 747, 927 P.2d 1129 (1996).

<sup>9</sup> CITE

## **II. AREAS WHERE THE SMA APPLIES**

The provisions of the SMA apply to almost every significant water body in the state. The SMA applies to all of the salt water bodies of the state, lakes (including reservoirs) over 20 acres in size and streams with a mean annual flow over 20 cubic feet per second (cfs).<sup>10 11</sup> These water bodies are known under the SMA as “shorelines.” The SMA also designates specific areas as “shorelines of state-wide significance.” Shorelines of state-wide significance include the Pacific Ocean, Hood Canal, lakes and reservoirs over 1000 acres, rivers on the west side of the Cascades over 1000 cfs and rivers on the east side of the Cascades over 200 cfs.<sup>12</sup> As noted below, shoreline of state-wide significance are accorded a higher level of scrutiny and protection than other shorelines.

The SMA also regulates uses and development on the lands adjacent to water bodies which qualify as shorelines. The area of upland jurisdiction is referred to as the “shoreland” or the “shoreland area,” and is defined by the act:

"Shorelands" or "shoreland areas" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all wetlands and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the department of ecology. Any county or city may determine that portion of a one-hundred-year-flood plain to be included in its master program as long as such portion includes, as a minimum, the floodway and the adjacent land extending landward two hundred feet therefrom[.]<sup>13</sup>

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<sup>10</sup> An oft-cited rule of thumb is that, if you can't step across a stream without getting your feet wet, it is over 20 cfs.

<sup>11</sup> RCW 90.58.030(2)(d); RCW 90.58.140.

<sup>12</sup> RCW 90.58.030(2)(e).

<sup>13</sup> RCW 90.58.030(2)(f).

As the definition makes clear, the point at which one starts to measure the extent of the shoreland area is the ordinary high water mark (OHWM), which is also defined by the act.<sup>14</sup>

The extent of the shorelands area can be different for different bodies of water. For instance, on a body of salt water such as Hood Canal, defining the shoreland area may be relatively simple: the first 200 feet of uplands measured from the OHWM. However, on a river the extent of the shoreland area may be much greater, because rivers have floodplains and floodways.<sup>15</sup> If the floodplain extends beyond the floodway (as it usually does), then the shoreland area extends as much a 200 feet beyond the edge of the floodway. Additionally, the SMA allows local governments to designate the entire 100 year floodplain as within SMA jurisdiction, regardless of the extent of the floodway. Wetlands that are “associated” with a water body are also covered by the SMA. The meaning of the term “wetlands” under the SMA is the same as the current popular use of the word – a marsh, bog or swamp. Wetlands are “associated” with a river, lake or body of salt water if they are connected to the water through surface or ground water.<sup>16</sup> In some areas, this connection can exist far away from the body of water.<sup>17</sup>

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<sup>14</sup> RCW 90.58.030(1)(b) defines the ordinary high water mark as the mark “on all lakes, streams, and tidal water is that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on June 1, 1971, as it may naturally change thereafter, or as it may change thereafter in accordance with permits issued by a local government or the department: PROVIDED, That in any area where the ordinary high water mark cannot be found, the ordinary high water mark adjoining salt water shall be the line of mean higher high tide and the ordinary high water mark adjoining fresh water shall be the line of mean high water[.]”

<sup>15</sup> The floodplain referred to in the act is the 100 year floodplain, generally as defined in maps issued by the Federal Emergency Management Agency. The floodway is defined by the Act as “those portions of the area of a river valley lying streamward from the outer limits of a watercourse upon which flood waters are carried during periods of flooding that occur with reasonable regularity, although not necessarily annually[.]” RCW 90.58.030(2)(g).

<sup>16</sup> CITE

<sup>17</sup> In *Westport by the Sea v. Ecology*, CITE, the Shorelines Hearings Board determined that wetlands overlaying a peninsula-wide fresh water aquifer are associated with the Pacific Ocean because the aquifer is hydraulically connected to the ocean.

### **III. POLICY OF THE SMA**

All development on shorelands must be consistent with the policy of the SMA.<sup>18</sup> That policy can be found in RCW 90.58.020. Although this section must be read as a whole to discern the complete policy of the SMA, it can be more easily understood by breaking it down into three pieces. The first deals with the broadest policy of the act:

The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

Although, because of its length, RCW 90.58.020 can be more easily digested by breaking it down into smaller chunks, the legal effect of the policy enunciated in the subsection should not be segregated. This first “findings” paragraph of the subsection illustrates one potential pitfall of reading RCW 90.58.020 as a statutory subsection with discreet parts. Normally, such an

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<sup>18</sup> RCW 90.58.140.

apparent statement of legislative intent – often known as a “preamble” – has no operative force in itself.<sup>19</sup> However, the SMA exempts itself from the normal rules of statutory construction:

This chapter is exempted from the rule of strict construction, and it shall be liberally construed to give full effect to the objectives and purposes for which it was enacted.<sup>20</sup>

Based on this dispensation, courts have held that the entirety of RCW 90.58.020 forms the operative policy of the SMA and that the language of the Act must be broadly construed to “protect the state shorelines as fully as possible.”<sup>21</sup> For example, although the Act mentions “piecemeal” development only in the initial “findings” paragraph, courts have ruled that the Act prohibits piecemealing of development in the shorelines area and adjacent uplands.<sup>22</sup>

The middle portion of RCW 90.58.020 contains language specifically addressing shorelines of statewide significance:

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of state-wide significance. The department, in adopting guidelines for shorelines of state-wide significance, and local government, in developing master programs for shorelines of state-wide significance, shall give preference to uses in the following order of preference which:

- (1) Recognize and protect the state-wide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shorelines;
- (6) Increase recreational opportunities for the public in the shoreline;
- (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

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<sup>19</sup> *State v. Alvarez*, 74 Wn.App 250, 872 P.2d 1123 (1994).

<sup>20</sup> RCW 90.58.900.

<sup>21</sup> *Beuchel v. Dept. of Ecology*, 125 Wn.2d 196, 884 P.2d 910 (1994).

<sup>22</sup> *Merkel v. Port of Brownsville*, 8 Wn.App. 844, 509 P.2d 390 (1973).

This section lays out clear priorities for the utilization of shorelines of state-wide significance, and indicates that an extremely high level of scrutiny must be applied in reviewing uses for those shorelines. This high level of scrutiny is reinforced in the standards set forth for master programs. Master program provisions which relate to shorelines of statewide significance cannot be approved unless they provide “optimum implementation” of the policies contained in RCW 90.58.020.<sup>23</sup> This higher level of scrutiny for shorelines of state-wide significance, however, does not work against other shorelines. The fact that uses on shorelines of state-wide significance must “preserve the natural character of the shoreline” does not mean that the Act sanctions development that destroys the natural character of shorelines which do not meet the criteria for state-wide significance.<sup>24</sup> Both the courts and the SHB have made clear that natural shorelines, regardless of whether they are listed as shorelines of state-wide significance, are accorded a high level of protection under the SMA.<sup>25</sup>

The final two paragraphs of RCW 90.58.020 include further policy statements which apply to all shorelines of the state.<sup>26</sup>

In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences and their

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<sup>23</sup> RCW 90.58.090(4).

<sup>24</sup> For example, almost every inch of Lake Washington’s shoreline has been urbanized, yet it is a shoreline of state-wide significance. By contrast, *none* of the San Juan Islands -- even those that are virtually untouched by human development -- are shorelines of state-wide significance. To argue that the SMA implicitly allows the destruction of the natural character of such undeveloped islands because they were omitted from the list of shorelines of state-wide significance would thwart the Act’s overall policy of protecting the state’s shorelines “as fully as possible.”

<sup>25</sup> CITE

<sup>26</sup> “Shorelines of the state” is the term the SMA uses to refer collectively to all shorelines and shorelines of state-wide significance. RCW 90.58.030(2)(c).

appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state. Alterations of the natural condition of the shorelines and shorelands of the state shall be recognized by the department. Shorelines and shorelands of the state shall be appropriately classified and these classifications shall be revised when circumstances warrant regardless of whether the change in circumstances occurs through man-made causes or natural causes. Any areas resulting from alterations of the natural condition of the shorelines and shorelands of the state no longer meeting the definition of "shorelines of the state" shall not be subject to the provisions of chapter 90.58 RCW.

Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

The sentence which begins “[a]lterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences and their appurtenant structures...” has often been misinterpreted to mean that the Act’s primary purposes was to protect property rights – specifically an individual’s desire to build a house on his/her shoreline property. The courts have flatly rejected this argument, holding that the protection of private property rights is a secondary policy to the primary policy of the Act, which is to protect the shorelines as fully as possible.<sup>27</sup> And, although single family residences are the first use listed in the sentence, the Act does not give them precedence over the other uses (water dependant uses, public access) that are listed.<sup>28</sup> In fact, residences are probably subservient to the other priority uses because residences are not a use which is dependant upon a shorelines location. The SHB has held that, in the limited instances where development of the shoreline is authorized, uses which are either inherently compatible with the natural environment or those which are unique or dependent upon shorelines locations (such as ports) are preferred.<sup>29</sup>

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<sup>27</sup> *Lund v. Dept. of Ecology*, 93 Wn.App 329 (1998).

<sup>28</sup> *Clifford, et. al v. City of Renton and Boeing*, SHB 92-52 (1993).

<sup>29</sup> *Nisqually Delta Assn. V. DuPont*, SHB No. 81-8 & 81-36 (1982).

#### **IV. HOW THE SMA GOVERNS ACTIVITIES ON THE SHORELINE**

The SMA makes clear that activities on shorelines of the state must be consistent with the regulatory framework created by the Act:

A development shall not be undertaken on the shorelines of the state unless it is consistent with the policy of this chapter and, after adoption or approval, as appropriate, the applicable guidelines, rules, or master program.<sup>30</sup>

The SMA created a cooperative, two tiered approach to regulating the use of Washington's shorelines. With the passage of the SMA, every county and each city containing shorelines was required to adopt a Shoreline Master Program. Master programs are:

. . .the comprehensive use plan for a described area, and the use regulations together with maps, diagrams, charts, or other descriptive material and text, a statement of desired goals, and standards developed in accordance with the policies enunciated in RCW 90.58.020[.]<sup>31</sup>

The Guidelines referred to in the first section quoted above are the master program guidelines which the Act required the Department of Ecology to adopt.<sup>32</sup> The Guidelines are a mandatory set of standards which each local government must follow in drafting their master program. The Guidelines must translate the broad policies of RCW 90.58.020 into standards for regulation of shoreline uses, as well as incorporate a specific set requirements set forth in the Act.<sup>33</sup>

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<sup>30</sup> RCW 90.58.140(1).

<sup>31</sup> RCW 90.58.030(3)(a).

<sup>32</sup> RCW 90.58.060.

<sup>33</sup> The SMA at RCW 90.58.100 states: The master programs provided for in this chapter, when adopted or approved by the department shall constitute use regulations for the various shorelines of the state. In preparing the master programs, and any amendments thereto, the department and local governments shall to the extent feasible:

(a) Utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts;

(b) Consult with and obtain the comments of any federal, state, regional, or local agency having any special expertise with respect to any environmental impact;

(c) Consider all plans, studies, surveys, inventories, and systems of classification made or being made by federal, state, regional, or local agencies, by private individuals, or by organizations dealing with pertinent shorelines of the state;

(d) Conduct or support such further research, studies, surveys, and interviews as are deemed necessary;

(e) Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data;

(f) Employ, when feasible, all appropriate, modern scientific data processing and computer techniques to store, index, analyze, and manage the information gathered.

(2) The master programs shall include, when appropriate, the following:

## The SMP amendment process

Every local government in the state containing shorelines currently has a valid master program conforming to the 1972 Guidelines. Upon the adoption of new SMP Guidelines by Ecology, local governments will have two years to submit to Ecology for review and approval amendments to their master programs consistent with the Guidelines.<sup>34</sup> Once a local government has developed and submitted to Ecology an amended SMP, Ecology must carry out a public review process for the amendment including, in the following order: A public comment period which includes the solicitation of comments by interested parties, groups and agencies; the forwarding of all public comment to the local government; a written response by the local government to the issues identified in the public comment period.<sup>35</sup>

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(a) An economic development element for the location and design of industries, industrial projects of state-wide significance, transportation facilities, port facilities, tourist facilities, commerce and other developments that are particularly dependent on their location on or use of the shorelines of the state;

(b) A public access element making provision for public access to publicly owned areas;

(c) A recreational element for the preservation and enlargement of recreational opportunities, including but not limited to parks, tidelands, beaches, and recreational areas;

(d) A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other public utilities and facilities, all correlated with the shoreline use element;

(e) A use element which considers the proposed general distribution and general location and extent of the use on shorelines and adjacent land areas for housing, business, industry, transportation, agriculture, natural resources, recreation, education, public buildings and grounds, and other categories of public and private uses of the land;

(f) A conservation element for the preservation of natural resources, including but not limited to scenic vistas, aesthetics, and vital estuarine areas for fisheries and wildlife protection;

(g) An historic, cultural, scientific, and educational element for the protection and restoration of buildings, sites, and areas having historic, cultural, scientific, or educational values;

(h) An element that gives consideration to the state-wide interest in the prevention and minimization of flood damages; and

(i) Any other element deemed appropriate or necessary to effectuate the policy of this chapter.

(3) The master programs shall include such map or maps, descriptive text, diagrams and charts, or other descriptive material as are necessary to provide for ease of understanding.

(4) Master programs will reflect that state-owned shorelines of the state are particularly adapted to providing wilderness beaches, ecological study areas, and other recreational activities for the public and will give appropriate special consideration to same.

<sup>34</sup> RCW 90.58.080.

<sup>35</sup> RCW 90.58.090(2).

Within thirty days of Ecology's receipt of the local government's written response to the public comment, Ecology must make written findings and conclusions regarding the consistency of the amendment with the SMA and the Guidelines, and either approve, deny or recommend changes to the amendment.<sup>36</sup> The standard of review for those provisions of a master program amendment effecting shorelines of state-wide significance goes beyond a mere finding of consistency: Ecology must find that the amendment provides the optimum implementation of the policies of the SMA to satisfy the state-wide interest.<sup>37</sup> If Ecology recommends changes, the local government must either agree to the changes or submit an alternative proposal.<sup>38</sup> If the recommended changes are accepted, the written notice of acceptance constitutes the final action by Ecology approving the amendment. If the local government submits an alternative proposal, Ecology must review the alternative for consistency with the department's recommended changes, the SMA and the Guidelines.<sup>39</sup> If Ecology finds the proposal to be consistent, it must approve the changes. However, if Ecology determines the proposed changes to be inconsistent, it may reject the proposal or enter into another cycle of public review.<sup>40</sup> Once a local government has successfully amended its SMP, the new SMP becomes the basis for making permitting decisions and regulating shoreline uses and development.

### **Permits & Exemptions**

Master programs are used by local governments to evaluate applications for shoreline permits and to regulate shoreline uses. Those uses can be broken down into two categories: Uses requiring a shoreline permit and uses which do not require a permit. The primary type of permit issued by local governments under the SMA is the shoreline "substantial development" permit.

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<sup>36</sup> *Id.*

<sup>37</sup> RCW 90.58.090(4).

<sup>38</sup> *Id.*

<sup>39</sup> RCW 90.58.090(2)(e)(ii).

<sup>40</sup> *Id.*

An individual must apply for such a permit if the proposed activity meets the definition of substantial development:

"Substantial development" shall mean any development of which the total cost or fair market value exceeds two thousand five hundred dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state[.]<sup>41</sup>

The SMA excepts a number of activities from the definition of "substantial development," including;<sup>42</sup>

- normal maintenance and repair of structures;
- construction of normal protective bulkheads for single family homes;
- normal agricultural practices;
- construction of owner-occupied single family residences;
- construction of private docks for single family homes which on salt water do not exceed \$2,500 in cost and on fresh water do not exceed \$10,000.

While these uses are exempt from the requirement to obtain a substantial development permit, they still must comply with the policies of the SMA and the substantive requirements of the local master program.<sup>43</sup> Such substantive compliance is required of any activity which qualifies as "development" under the SMA:

"Development" means a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level[.]<sup>44</sup>

However, even if an activity is neither "development" or "substantial development," it may be still regulated by the local master program. The Supreme Court has ruled that the SMA's language allows regulation of uses of the shoreline such as public access and recreation,<sup>45</sup> and

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<sup>41</sup> RCW 90.58.030(3)(e).

<sup>42</sup> The complete list of exempt uses is found at RCW 90.58.030(3)(e)(i) – (xi).

<sup>43</sup> *Putnam v. Carroll*, 13 Wn.App. 201, 534 P.2d 132 (1975).

<sup>44</sup> RCW 90.58.030(3)(d).

<sup>45</sup> The SMA, in fact, *requires* that master programs address public access and recreation. RCW 90.58.100.

commercial uses such as the gathering of shellfish,<sup>46</sup> which do not qualify as “development” or “substantial development.” Such uses may be regulated by means of the second category of shoreline permits: Variance and conditional use permits.<sup>47</sup> For instance, a single family home will be exempt from the requirement to obtain a substantial development permit, but if it is proposed for a sensitive area the local master program may require the owner to obtain a conditional use permit. To obtain a conditional use permit, the applicant must show that the home meets the conditional use criteria in Ecology’s rules<sup>48</sup> and the local master program. If the applicant wishes to build the home closer to the water than the master program allows, a variance must be obtained.<sup>49</sup> The SMA, however, specifies that variances “shall be allowed only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect.”<sup>50</sup> While the local government is the sole decision making entity for a substantial

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<sup>46</sup> *Clam Shacks v. Skagit County*, 109 Wn.2d 91, 743 P.2d 265 (1987).

<sup>47</sup> RCW 90.58.100(5).

<sup>48</sup> The applicant for a conditional use permit must demonstrate

- (a) That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;
- (b) That the proposed use will not interfere with the normal public use of public shorelines;
- (c) That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;
- (d) That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and
- (e) That the public interest suffers no substantial detrimental effect. Additionally, in the granting of all conditional use permits, consideration shall be given to the cumulative impacts of additional requests for like actions in the area. WAC 173-27-160.

<sup>49</sup> The applicant for a variance must demonstrate:

- (a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes, or significantly interferes with, reasonable use of the property;
- (b) That the hardship described in (a) of this subsection is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant’s own actions;
- (c) That the design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program and will not cause adverse impacts to the shoreline environment;
- (d) That the variance will not constitute a grant of special privilege not enjoyed by the other properties in the area;
- (e) That the variance requested is the minimum necessary to afford relief; and
- (f) That the public interest will suffer no substantial detrimental effect. WAC 173-27-170.

<sup>50</sup> RCW 90.58.100(5); *Buechel* at 205.

development permit, a variance or conditional use permit issued by a local government must also be approved by the Department of Ecology.

## **V. APPEALS**

The SMA provides appeal processes for the range of actions which are authorized by the statute. Any person who feels aggrieved by a permit decision of a local government or Ecology may appeal the decision to the SHB.<sup>51</sup> The SHB is a quasi-judicial board comprised of the three permanent members of the Pollution Controls Hearings Board, the designee of the Commissioner of Public Lands, a representative of the Association of Cities and a representative of the Association of County Commissioners.<sup>52</sup> The Supreme Court has recognized the SHB as a body with specialized skills in hearing shoreline cases.<sup>53</sup> Similarly, enforcement orders and rules issued by Ecology (including revisions to the Guidelines) may be appealed to the SHB.<sup>54</sup> Decisions on revisions to master programs for local jurisdictions planning under the Growth Management Act may be appealed to the Growth Management Hearings Board; revisions for non-GMA jurisdictions may be appealed to the SHB.<sup>55</sup> A party unhappy with the result of any of the appeals listed above may appeal the board's decision to superior court.<sup>56</sup>

## **VI. USES WHICH EXISTED BEFORE 1971**

General principles of land use law recognize the right to exist of structures and uses which predate a statute or regulation, but which no longer would be allowed under the prevailing statutes or regulations. Known as "prior nonconforming uses," these uses and structures must have been legally established prior to the effective date of the applicable statute. Non

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<sup>51</sup> RCW 90.58.180(1).

<sup>52</sup> RCW 90.58.170.

<sup>53</sup> *Buechel* at 204.

<sup>54</sup> RCW 90.58.210(4); RCW 90.58.180(4).

<sup>55</sup> RCW 90.58.190.

<sup>56</sup> RCW 90.58.180(3), (7); RCW 90.58.190(2)(e), (3)(e).

conforming uses are disfavored under the law and public policy encourages the restriction of them so that they may ultimately be phased out.<sup>57</sup> The SMA specifically recognized the right to exist of one class of use which preexisted the statute:

Nothing in this statute shall constitute authority for requiring or ordering the removal of any structures, improvements, docks, fills, or developments placed in navigable waters prior to December 4, 1969, and the consent and authorization of the state of Washington to the impairment of public rights of navigation, and corollary rights incidental thereto, caused by the retention and maintenance of said structures, improvements, docks, fills or developments are hereby granted[.]<sup>58</sup>

This language in the Act was a direct response to the Supreme Court's decision in *Wilbour v. Gallagher*,<sup>59</sup> in which the court held that fill placed in Lake Chelan violated the public's right of navigation under the public trust doctrine. Other types of prior nonconforming uses are addressed in local master programs and in Ecology's rules.<sup>60</sup>

## **VII. THE SMA, GROWTH MANAGEMENT AND THE 1995 AMENDMENTS**

Twenty years after the SMA was conceived, the legislature passed the Growth Management Act, Ch. 36.70A RCW. The GMA required on a jurisdiction-wide basis the kind of planning that the SMA had required for two decades. In 1995 the legislature passed ESHB 1724. One of the purposes of ESHB 1724 was to provide some integration of the GMA and SMA. The GMA was amended to include the policy of the SMA as a goal of the GMA; to make the goals and policies of a jurisdiction's master program an automatic part of the goals and policies of its GMA comprehensive plan and; to make the remainder of its SMP provisions an automatic part of its GMA development regulations.<sup>61</sup> The 1995 amendments also specifically provided that

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<sup>57</sup> *Jefferson County v. Seattle Yacht Club*, 73 Wn.App 576, 870 P.2d 987 (1994).

<sup>58</sup> RCW 90.58.270(1).

<sup>59</sup> 77 Wn.2d 306, 462 P.2d 232 (1969).

<sup>60</sup> WAC 173-27-080.

<sup>61</sup> RCW 36.70A.480.

nothing in the GMA may be construed to allow a jurisdiction to adopt regulations affecting shorelines which are inconsistent with the SMA.<sup>62</sup>

ESHB 1724 amended the SMA in two basic ways. First, it required Ecology to review and update the Guidelines every 5 years.<sup>63</sup> Second, it transferred appeals of master program revisions for GMA jurisdictions from the SHB to the Growth Management Hearings Board. One provision of the SMA that was not affected by ESHB 1724 was the “adjacent lands” provisions in RCW 90.58.240:

All state agencies, counties, and public and municipal corporations shall review administrative and management policies, regulations, plans, and ordinances relative to lands under their respective jurisdictions adjacent to the shorelines of the state so as the [to] achieve a use policy on said land consistent with the policy of this chapter, the guidelines, and the master programs for the shorelines of the state. The department may develop recommendations for land use control for such lands. Local governments shall, in developing use regulations for such areas, take into consideration any recommendations developed by the department as well as any other state agencies or units of local government.

This original provision has remained unchanged since the passage of the SMA in 1971. Although the 1995 amendments to the GMA explicitly included SMA policy within land use planning, local governments have been under an obligation for almost thirty years to make land use planning adjacent to the shoreline consistent with the SMA.

In contrast to the changes brought by ESHB 1724, the current 1972-era Guidelines do not provide any guidance to local governments with regard to the integration of shoreline master programs and GMA comp plans and development regulations.

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<sup>62</sup> RCW 36.70A.481.

<sup>63</sup> The language of the statute as amended by ESHB 1724 requires that “[a]t least once every five years [Ecology] shall conduct a review of the guidelines pursuant to the procedures outlined in subsection (2) of this section.” However, subsection (2) is the adoption procedure for amendments to the Guidelines. RCW 90.58.060. Thus, when the two subsections are read together the language reads, in practical terms, “[a]t least once every five years the department shall conduct a review of the guidelines [and adopt amendments] pursuant to the procedures outlined in subsection (2) of this section.”

## **VIII. ESA AND SALMON RECOVERY**

Almost three decades before the listing of Puget Sound and Columbia River salmon under the Endangered Species Act, the SMA recognized that uncontrolled development on Washington's shorelines threatened the health of fish. The RCW 90.58.020 states that the SMA's policy:

. . .contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and *the waters of the state and their aquatic life*, while protecting generally public rights of navigation and corollary rights incidental thereto. . .Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.(emphasis added).

The ESA did not trigger the SMA's mandate that fish and their habitat be protected – that mandate has existed since 1971. The salmon listings, however, highlighted the inescapable fact that the current system of regulation under the SMA – Guidelines and master programs a quarter-century old – have failed in recent years to effectively carry out the policy directives of the Act. The plain language of the SMA ("The department shall periodically review and adopt guidelines consistent with RCW 90.58.020. . .") requires that the decades-old rules and regulations governing shoreline development be updated to protect the state's shorelines and their aquatic life as fully as possible. And, although some have argued that the Guidelines and master programs can go no further than to preserve what little shoreline habitat is left, the very first sentence of the SMA belies that argument:

The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, *restoration*, and preservation.<sup>64</sup>  
(Emphasis added)

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<sup>64</sup> RCW 90.58.020.

## **IX. SUMMARY**

For almost thirty years the Shoreline Management Act has been administered by local and state government as the primary tool for regulating development on the state's shorelines. In scores of written opinions the courts and Shorelines Hearings Board have interpreted and expanded upon the broad but relatively brief language of the statute. While the words of the SMA are more relevant today than ever before, the tools used to apply those words to the real world have become antiquated and ineffective. While the state's shorelines have seen dramatic change since the mid-1970's, the current master program guidelines and the vast majority of current master programs have remained static. The Guidelines and master programs must be brought up to date in order to comply with the SMA's purpose of protecting the shorelines of the state as fully as possible.